

1 Margo Piscevich, NV Bar No. 0917  
Mark J. Lenz, Esq., NV Bar No. 4672  
2 Piscevich & Fenner  
499 West Plumb Lane, Suite 201  
3 Reno, Nevada 89509  
Tel: (775) 329-0958  
4 Fax: (775) 329-2666  
*Attorneys for DEFENDANTS*

5  
6 **U.S. DISTRICT COURT**  
7 **DISTRICT OF NEVADA**

8  
9 KEVIN J. MIRCH, ESQ.,

Case No. 3:05-cv-00641-RLH-RAM

10 Plaintiff,

11 v.

12 BRUCE BEESLEY, ROB BARE, BRIDGET ROBB  
13 PECK, DONALD CHRISTENSEN, STATE BAR OF  
14 NEVADA, DOES I-X, A-Z CORPORATIONS,

15 Defendants

16 **Motion to Dismiss (Fed.R.Civ.P. 12(b)(1))**

17 Defendant State Bar of Nevada ("State Bar"), for itself alone, moves the Court pursuant  
18 to Fed. R. Civ. P. 12(b)(1) for an Order dismissing Plaintiff's Complaint on the grounds that this  
19 Court lacks subject matter jurisdiction over the State Bar. The Eleventh Amendment of the  
20 United States Constitution prevents this Court from exercising subject matter jurisdiction over  
21 the State Bar, which, as an arm of the state, is immune from this and similar lawsuits.  
22 Furthermore, as Plaintiff concedes in his First Amended Complaint, pre-existing ongoing  
23 disciplinary proceedings before the State Bar against Plaintiff require this Court to abstain in  
24 favor of the state judicial proceedings, pursuant to the *Younger* abstention doctrine.  
25  
26  
27  
28

1 This motion is based on the pleadings and papers filed herein, the Memorandum of Points  
2 and Authorities which follow, and upon such further evidence and argument of counsel as the  
3 Court may require or allow.  
4

## 5 Memorandum Of Points And Authorities

### 6 I. Nature of the Case.

7 On November 23, 2005, Plaintiff Kevin Mirch ("Mirch") filed a complaint in this court  
8 for the sole purpose of obfuscating a disciplinary proceeding pending against him before the  
9 State Bar. He did not serve this complaint on any Defendant. On March 23, 2006, 120 days  
10 later, Mirch filed a First Amended Complaint and served it on Defendants.<sup>1</sup> Mirch's First  
11 Amended Complaint is indisputably a prime example of vexatious and inappropriate litigation,  
12 comprising sixty (60) pages and four hundred (400) paragraphs of repetitive, accusatory,  
13 defamatory, largely unintelligible allegations against a panoply of judges, mediators, attorneys  
14 and State Bar officials, all of whom are accused of conspiring against Mirch to destroy his law  
15 practice and reputation. His allegations span a period of twenty (20) years or more, and range  
16 from nefarious political skullduggery, to terrorism (bombing of his office), to theft and fraud, to  
17 intent to cause Mirch mental harm. However, Mirch's allegations, even if they were all, in some  
18 imaginable universe, to be accepted as true, must fail to overcome the obvious and fatal  
19 jurisdictional deficiencies in his First Amended Complaint.  
20  
21

22 Although Mirch is an attorney licensed to practice law in the State of Nevada since  
23 December 31, 1983, (Nevada State Bar Number 923), and has had some apparent successes in  
24 his practice, he has also been accused on numerous occasions of stepping beyond the bounds of  
25  
26

---

27 <sup>1</sup> Plaintiff also employed this delayed-service tactic in the underlying state action before Judge  
28 Hardesty, who determined the conduct to be additional evidence of bad-faith on Plaintiff's part.

1 legal propriety, one of which purportedly forms the basis for this present action. On September  
 2 26, 2002, he filed a First Amended Complaint in the Second Judicial District Court, Washoe  
 3 County, Nevada, *styled Kevin J. Mirch, Doe Plaintiffs A-Z v. McDonald, Carano & Wilson, LLP,*  
 4 *Leigh Goddard, Esq., and Doe Attorneys 1-10.,* case no. CV02-05644. On October 9, 2003,  
 5 District Judge James Hardesty entered an Order Dismissing Plaintiff's lawsuit, imposing  
 6 sanctions pursuant to NRCP 11, and referring the matter to the State Bar for disciplinary  
 7 investigation. Following additional correspondence and investigation, the State Bar filed a  
 8 Formal Complaint against Mirch on June 14, 2004. After extensive motion practice and  
 9 continuances, most of which were requested by Mirch, the matter is scheduled for hearing  
 10 beginning July 13, 2006. It is this hearing which Mirch now seeks to enjoin.

## 11 II. Statement Of Facts.

12 The nature and organization of the State Bar is established by statute and rules  
 13 promulgated by the Nevada Supreme Court. The State Bar of Nevada is a public corporation  
 14 created by statute. NRS 7.275 (2001) provides,

15 1. The State Bar of Nevada, a public corporation heretofore created by statute, is hereby  
 16 continued ***under the exclusive jurisdiction and control of the supreme court.***

17 2. The State Bar of Nevada has perpetual succession and a seal and it may sue and be  
 18 sued. It may, for the purpose of carrying into effect and promoting its objectives:

19 (a) Make contracts.

20 (b) Own, hold, use, manage and deal in and with real and personal property.

21 (c) Do all other acts incidental to the foregoing or necessary or expedient for the  
 22 administration of its affairs and the attainment of its purposes.

23 3. Rules for the government of the State Bar of Nevada shall be made by the supreme  
 24 court pursuant to NRS 2.120

25 (Emphasis added).

26 Nevada Supreme Court Rule (SCR) 76 expands upon this language, and provides,

27 1. The State Bar of Nevada, a public corporation heretofore created by statute, shall  
 28 govern the legal profession in this state, subject to the approval of the supreme court.

***The state bar is under the exclusive jurisdiction and control of the supreme court*** and

is an association of persons now or hereafter regularly licensed to practice law in the State of Nevada.

2. The state bar has perpetual succession and a seal and it may sue and be sued. It may, for the purpose of carrying into effect and promoting its objectives, make contracts, own, hold, use, manage and deal in and with real and personal property, subpoena witnesses for the purpose of aiding in cases of discipline, suspension or disbarment, or application for admission, and do all other acts incidental to the foregoing or necessary or expedient for the administration of its affairs and the attainment of its purposes

(Emphasis added).

Finally, with respect to discipline of Nevada-licensed attorneys, SCR 99 provides,

1. Every attorney admitted to practice law in Nevada or specially admitted by a court of this state for a particular proceeding, or practicing law here, whether specially admitted or not, *is subject to the exclusive disciplinary jurisdiction of the supreme court and the disciplinary boards and hearing panels created by these rules.*

2. Nothing contained in these rules denies any court the power to maintain control over proceedings conducted before it, such as the power of contempt, nor do these rules prohibit any association from censuring, suspending, or expelling its members.

(Emphasis added).

As noted, Mirch is a Nevada-licensed attorney. [First Amended Complaint, ¶ 16].

Mirch's Fifth Cause of Action, among others, alleges that there are already ongoing disciplinary proceedings in this matter arising from Judge Hardesty's Order which pre-date this present action. Because of the near-impossible difficulty in citing to any specific facts in Mirch's First Amended Complaint, the State Bar attaches hereto as **Exhibit "A"** a copy of the discipline Complaint currently pending before the State Bar.

### III. Argument

A. This Court Lacks Subject Matter Jurisdiction Over The State Bar Of Nevada Based Upon Sovereign Immunity, As Provided For In The Eleventh Amendment To The United States Constitution.

1 This Court lacks subject matter jurisdiction to adjudicate Mirch's action for injunctive  
 2 and declaratory relief against the State Bar because the State Bar enjoys immunity from suit  
 3 pursuant to the Eleventh Amendment of the United States Constitution. The Eleventh  
 4 Amendment of the United State Constitution provides: "The Judicial power of the United States  
 5 shall not be construed to extend to any suit in law or equity, commenced or prosecuted against  
 6 one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign  
 7 State."  
 8

9 It is well established that the Eleventh Amendment stands as jurisdictional bar to suits  
 10 brought in federal court against state agencies and departments. *Charley's Taxi and Radio*  
 11 *Dispatch v. Sida of Hawaii*, 810 F.2d 869, 873 (9th Cir. 1987) citing *Almond Hill School v.*  
 12 *United States Department of Agriculture*, 768 F.2d 1030, 1034 (9th Cir. 1985). *See, also,*  
 13 *Alabama v. Pugh*, 438 U.S. 781, 781-82 (1977), *Elderman v. Jordan*, 415 U.S. 651, 678, 94 S.Ct.  
 14 1347, 1363 (1974)("the Eleventh Amendment immunity defense sufficiently partakes of the  
 15 nature of a jurisdictional bar . . ."); *Draper v. Coombs*, 792 F.2d 915, 918 (9th Cir. 1986); *Wu v.*  
 16 *State Bar of California*, 953 F. Supp. 315; 318-19 (C.D. Cal. 1997)(asserting that "[t]he Eleventh  
 17 Amendment provides the State Bar of California with immunity from suits in federal court for  
 18 monetary relief.").

19 This immunity exists whether the relief sought is legal or equitable. *Papasan v. Allain*,  
 20 478 U.S. 277, 106 S.Ct. 2932 (1986), citing *Pennhurst State School and Hospital v. Halderman*,  
 21 465 U.S. 89, 10, 14 S.Ct. 900, 908 (1984). It is also well established that the only exception to  
 22 this immunity, absent an "unequivocal indication" of a waiver of that immunity,<sup>2</sup> is a suit  
 23 seeking to prospectively enjoin a "state official" from engaging in an alleged unconstitutional  
 24  
 25  
 26

---

27 <sup>2</sup> See *Charley's Taxi, supra*, at 873, citing *Atascadero State Hospital v. Scanlon*, 473 U.S.  
 28 234, 105 S.Ct. 3142, 3145 n. 1, 87 LEd.2d 171 (1985).

1 act. *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 10, 14 S.Ct. 900, 908  
 2 (1984). *Papasan v. Allain*, 478 U.S. 265, 277, 16 S.Ct. 2932, 2939 (1986), citing *Ex parte Young*,  
 3 29 U.S. 123, 28 S.Ct. 441 (1908). *See, also, Standard Alaska Prod. Co. v. Schaible*, 874 F.2d  
 4 624, 626 (9th Cir. 1989)(emphasis added).

5 The Nevada Supreme Court is immune from suit in federal court. *Louis v. Supreme*  
 6 *Court of Nevada*, 490 F.Supp. 1174, 1180 (D. Nev. 1980) (“The Supreme Court of Nevada is an  
 7 agency of the State of Nevada and immune from suit under the Eleventh Amendment to the U. S.  
 8 Constitution.” citing, *Brown v. Supreme Court of Nevada*, 476 F.Supp. 86 (D.Nev.1979)).  
 9 Indeed, the Supreme Court is the State of Nevada. *Goldberg v. Eighth Judicial Dist. Court*, 572  
 10 P.2d 521, 522, 93 Nev. 614, 615 (1977) (“[I]t is clear that the judiciary, as a coequal branch of  
 11 government, has inherent powers to administer its affairs.”)<sup>3</sup>

12 [T]he State Bar of Nevada is the investigative arm of the Nevada Supreme Court  
 13 charged with investigating and disciplining the legal profession in Nevada." *O'Connor v. State of*  
 14 *Nevada*, 57 F.Supp. 546, 550 (D. Nev. 1981), *aff'd*, 686 F.2d 749 (9th Cir. 1982), *cert. den.*, 459  
 15 U.S. 1071, 103 S.Ct. 491 (1982). *See, also, Ginter v. State Bar of Nevada*, 625 F.2d 829, 830  
 16 (9th Cir. 1980)(affirming the dismissal of a plaintiff's suit because "the Nevada State Bar  
 17 Association, as an arm of the state, is not subject to suit under the Eleventh Amendment"). As  
 18 "arms of the state itself," the State Bar of Nevada and the Supreme Court of Nevada do *not* act in  
 19 the capacity of "state official[s]" as contemplated by the only exception to Eleventh Amendment  
 20 immunity set forth in *Ex parte Young, supra*, and its progeny. *Id.*

---

21  
 22  
 23  
 24  
 25  
 26  
 27 <sup>3</sup> Article 3, section 1, of the Nevada Constitution provides, "The Powers of the Government of the  
 28 State of Nevada shall be divided into three separate departments, the Legislative, the Executive  
 and the Judicial;...." Article 6, section 1, provides, "The Judicial power of this State shall be  
 vested in a court system, comprising a Supreme Court, District Courts, and Justices of the Peace."

1 In short, a state itself or an "arm" thereof is *not* subject to a suit for any form of injunctive  
2 or declaratory relief in light of the Eleventh Amendment's express jurisdictional bar, absent an  
3 unequivocal waiver. Suffice it to say, Nevada has expressly *refused* to waive its Eleventh  
4 Amendment immunity. NRS 41.031(4). In light of the foregoing, the State Bar of Nevada  
5 respectfully hereby invokes its Eleventh Amendment immunity as an express jurisdictional bar to  
6 Mirch's suit. Therefore, Mirch's claims against the State Bar of Nevada must be dismissed  
7 because this Court lacks subject matter jurisdiction.  
8

9 B. The Abstention Doctrine Set Forth In *Younger v.*  
10 *Harris* Mandates That This Court Refrain From  
11 Intervening In Ongoing Disciplinary Proceedings.

12 In *Younger v. Harris*, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), the United States Supreme  
13 Court reversed the decision of the Central District of California enjoining prosecution and  
14 enforcement of California's Criminal Syndicalism Act on the grounds it was unconstitutionally  
15 vague and overbroad. The Supreme Court found that the injunction was, "a violation of the  
16 national policy forbidding federal courts to stay or enjoin pending state court proceedings except  
17 under special circumstances." *Id.*, at 749 (*citing* 28 U.S.C. 2283, "A court of the United States  
18 may not grant an injunction to stay proceedings in a State court except as expressly authorized by  
19 Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its  
20 judgments.")). The Supreme Court also reversed the declaratory judgment entered by the lower  
21 court, noting that, "declaratory relief is also improper when a prosecution involving the  
22 challenged statute is pending in state court at the time the federal suit is initiated." *Id.*, at n.2.

25 In *Rosenthal v. Carr*, 614 F.2d 1219, (9<sup>th</sup> Cir. 1980), the Ninth Circuit Court of Appeals  
26 extended the abstention doctrine to disciplinary hearings. In *Rosenthal*, Plaintiff was a  
27 California licensed attorney against whom disciplinary proceedings were pending. He filed suit  
28

1 in federal court, seeking injunction and declaratory relief against the State Bar. In affirming the  
2 dismissal, the Appeals Court stated,

3 The abstention doctrine, as announced in *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746,  
4 27 L.Ed.2d 669 (1971) and extended in *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 95 S.Ct.  
5 1200, 43 L.Ed.2d 482 (1975), and *Trainor v. Hernandez*, 431 U.S. 434, 97 S.Ct. 1911,  
6 52 L.Ed.2d 486 (1977), bars a federal court from enjoining pending state court criminal  
7 or civil enforcement proceedings absent exceptional circumstances. ***We agree with***  
8 ***decisions of the Second, Third and Fourth Circuits that the abstention doctrine***  
9 ***generally precludes federal court interference with pending state attorney disciplinary***  
10 ***proceedings.*** *Anonymous v. Association of the Bar of City of New York*, 515 F.2d 427  
11 (2d Cir.), *cert. denied*, 423 U.S. 863, 96 S.Ct. 122, 46 L.Ed.2d 92 (1975); *Erdmann v.*  
12 *Stevens*, 458 F.2d 1205 (2d Cir.), *cert. denied*, 409 U.S. 889, 93 S.Ct. 126, 34 L.Ed.2d  
13 147 (1972); *Gipson v. New Jersey Supreme Court*, 558 F.2d 701 (3d Cir. 1977);  
14 *American Civil Liberties Union v. Bozardt*, 539 F.2d 340 (4th Cir.), *cert. denied*, 429  
15 U.S. 1022, 97 S.Ct. 639, 50 L.Ed.2d 623 (1976). *See also* *Mildner v. Gulotta*, 405  
16 F.Supp. 182 (E.D.N.Y.1975), *aff'd sub. nom. Levin v. Gulotta*, 425 U.S. 901, 96 S.Ct.  
17 1489, 47 L.Ed.2d 751 (1976).

18 *Id.* (emphasis added).

19 A year later, the Ninth Circuit revisited the abstention doctrine in disciplinary matters in  
20 *Flangas v. State Bar of Nevada*, 655 F.2d 946 (9<sup>th</sup> Cir. 1981). Four of the five sitting Justices of  
21 the Nevada Supreme Court appealed an order of the District Court enjoining disciplinary  
22 proceedings based upon the District Court's finding of "bias-in-fact" by the Nevada Supreme  
23 Court against Flangas. "The district judge concluded that the bias-in-fact on the Nevada  
24 Supreme Court constituted an "exceptional circumstance" that is an exception to the general rule  
25 against enjoining ongoing state proceedings." *Id.*, at 948.<sup>4</sup>

26 The Court of Appeals reversed. "[T]he abstention doctrine would normally bar the  
27 district court from enjoining the pending attorney disciplinary proceeding absent a showing by  
28 Flangas of "exceptional circumstances." *Id.*, at 949. However, the Court found that since  
Flangas had failed to utilize statutory and constitutional measures available under Nevada law to

---

<sup>4</sup> It should be noted that the District Court dismissed the State Bar of Nevada as a defendant, which dismissal Flangas did not appeal.



1 cure the alleged bias of Nevada Supreme Court, it could not be determined whether there were  
2 "exceptional circumstances" as would allow district court to enjoin disciplinary proceeding  
3 before Nevada Supreme Court.  
4

#### 5 IV. Conclusion.

6 Mirch's lawsuit concerns a disciplinary proceeding before the State Bar of Nevada  
7 against a Nevada-licensed attorney. The State Bar enjoys constitutional immunity in this matter  
8 and, accordingly, this Court lacks subject matter jurisdiction.  
9

10 Even if suit were later brought against an individual official of the State Bar instead of  
11 the Bar itself, this Court would be required to abstain in favor of the already ongoing state  
12 judicial proceedings. Accordingly, this Court should grant The State Bar's Motion to Dismiss  
13 with Prejudice for Lack of Subject Matter Jurisdiction and consistent with the *Younger*  
14 abstention doctrine.  
15

16 Dated this 19<sup>th</sup> day of April, 2006.  
17

18 PISCEVICH & FENNER

19 By: /s/ \_\_\_\_\_  
20 Mark J. Lenz, Esq.  
21 499 West Plumb Lane, Suite 201  
22 Reno, NV 89509  
23 Attorneys for Defendants  
24  
25  
26  
27  
28

**Piscevich & Fenner**  
 499 West Plumb Lane, Suite 201  
 Reno, NV 89509 775.329.0958

## CERTIFICATE OF SERVICE

Pursuant to FRCP 5(b), I hereby certify that I am an employee of PISCEVICH & FENNER and that on this date I caused to be served a true and correct copy of the document described herein by the method indicated below, and addressed to the following:

**Document Served:** MOTION TO DISMISS

**Person(s) Served:**

Kevin J. Mirch  
 329 Flint Street  
 Reno, NV 89501

_____	Hand Deliver
<u>XX</u>	U.S. Mail
_____	Overnight Mail
_____	Facsimile
	[number]

DATED this 19<sup>th</sup> day of April, 2006.

/s/ \_\_\_\_\_  
 TERESA BORJON